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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ALAN JOSEPH MARQUEZ,** **Defendant and Appellant.**	**A104035** **(San Mateo County Super. Ct. No. SC053127A)**

Alan Joseph Marquez appeals from his conviction of inflicting corporal injuries upon a child and a cohabitant, and six counts of misdemeanor child endangerment. He contends that the trial court erred in admitting two videotaped statements and evidence of prior domestic violence, that the trial court erred in failing to give a unanimity instruction, that there was insufficient evidence to support one of the child endangerment convictions, and that the sentence imposed is unconstitutional under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We reverse the judgment of conviction on counts 6, 7, 9 and 10, and affirm the remainder of the judgment.

PROCEDURAL BACKGROUND

On February 5, 2003, the district attorney filed an information in San Mateo County Superior Court alleging 11 counts against Marquez. The first five counts were allegedly committed on or about January 5, 2003. Count 1 alleged the infliction of corporal injury (Pen. Code, § 273.5, subd. (a)) upon the cohabiting mother of Marquez's

children (Mother); count 2 alleged the infliction of corporal injury (§ 273d) upon one of Marquez's sons, Son-1; counts 3, 4 and 5 alleged misdemeanor child endangerment (§ 273a, subd. (b)) of each of Marquez's three sons, Son-1, Son-2 and Son-3. Counts 6 through 11 alleged offenses committed on and between March 15, 2002 and January 4, 2003. Counts 6, 7 and 8 alleged the infliction of corporal injuries upon Son-1 and counts 9, 10 and 11 alleged the infliction of corporal injuries upon Son-2. The information also alleged that Marquez had incurred various prior felony convictions and prison terms.

On June 10, 2003, the jury found Marquez guilty as charged in counts 1, 2, 4 and 5. It found Marquez guilty of the lesser included offense of misdemeanor injury to a child (Pen. Code, § 273a, subd. (b)) on counts 6, 7, 9 and 10. It returned a verdict of not guilty on counts 8 and 11, and returned no verdict on count 3.

On July 23, 2003, the court sentenced Marquez to state prison for a total term of 11 years, consisting of a six-year upper term on count 2, plus one consecutive year on count 1, plus four consecutive years due to Marquez's four prior prison terms. The misdemeanor convictions for counts 4, 5, 6, 7, 9 and 10 were stayed under Penal Code section 654. This appeal followed.

FACTUAL BACKGROUND

We view the evidence in the light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

Marquez has three sons with Mother: Son-1, born in 1992; Son-2, born in 1996; and Son-3, born in 2001 or 2002. At the time of trial, Son-1 was 10 years old and Son-2 was 7 years old. Between 1995 and 2002, Marquez was married to Deolinda V. In March 2002, Mother moved with the three sons into a residence with Marquez in Redwood City.

At the Redwood City residence during 2002, Marquez hit and pushed Mother and used his hands and a belt to hit the two older boys. Mother testified that Marquez spanked Son-1 and Son-2 on three occasions. One time the boys had big bruises on their

backs, buttocks, and legs. Son-1 testified that Marquez hit Mother on a daily basis and hit him and his brother on a weekly basis.

Marquez and Mother argued the evening of January 5, 2003. Around 10:30 to 11:00 p.m., Mother attempted to retrieve Son-3 from a bedroom where he was with Marquez in order to put him to bed. Marquez got upset and tried to push her out the door. Mother's hand accidentally got caught in the door. Mother went into the kitchen; Marquez followed her and hit her hard in the head with the "TV" remote control. Marquez then followed Mother to another room and pushed her to the floor; she hit her head on a metal wall heater. The boys were crying and telling Marquez to leave Mother alone. He threatened them with a belt and then proceeded to kick and hit Mother with the belt when she tried to stop him. The boys continued to yell at Marquez to stop, and he slapped Son-1 in the face, leaving a hand print, and left the residence.

About a week later, Police Officer Russell Federico came to the residence after being flagged down by Mother's brother. Mother told Officer Federico everything was fine, but Son-1 told her to tell the officer what was happening. Mother told Son-1 to be quiet and not say anything. When Officer Federico took Son-1 aside, he said that Marquez had been hitting Mother, him, and Son-2. When taken aside, Son-2 made similar statements to the officer. The officer took Mother and the three boys to the police station. The police interviewed Mother, Son-1, and Son-2 separately. In videotaped statements, Son-1 and Son-2 told Officer Federico that Marquez had hit them and Mother. Mother reluctantly admitted that Marquez had inflicted injuries upon her.

At trial, Mother also described being threatened and hit by Marquez in 1991 and 2001. Mother admitted that in the year 2000 she wrote a letter to Marquez's parole officer pretending to be Marquez's wife, Deolinda V. Mother accused Marquez of being abusive, of using alcohol and drugs, and of posing a danger to society.

A Redwood City police detective gave expert testimony on behalf of the prosecution about domestic violence and battered women.

Marquez testified in his own defense. He admitted he may have accidentally shut the bedroom door on Mother's fingers in early January 2003, but denied any other

contact with her that night. He also testified that he had twice spanked his two older boys with a belt, but not hard, and only for disciplinary purposes after explaining the reason for the punishment. The spankings did not leave any marks.

Several witnesses for the defense testified that they had never seen Marquez hit his children or had never seen any injuries on Mother or on the boys.

DISCUSSION

I. *The Trial Court Did Not Err in Admitting the Two Videotaped Statements*

After bringing Mother and the boys to the Redwood City Police Department, Officer Federico took videotaped statements from the two older boys. Both boys claimed that Marquez had beaten Mother. The trial court granted the prosecution's motion to admit the statements under Evidence Code section 1360, and both videotaped statements were played to the jury at trial.

Evidence Code section 1360 creates a limited exception to the hearsay rule in criminal prosecutions permitting the admission of certain statements describing acts of child abuse or neglect. Section 1360 provides in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another . . . is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

We conclude that the trial court did not err in admitting the videotaped statements.

A. *Admission of the Videotaped Statements Was Not Unconstitutional*

Marquez contends that the admission of the videotaped statements violated his Sixth Amendment right to confrontation, as recently clarified by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354]. In

Crawford, the Supreme Court rejected the confrontation clause analysis adopted in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, which admitted hearsay containing "particularized guarantees of trustworthiness." *Crawford* held that certain out-of-court statements, denominated " 'testimonial,' " were inadmissible unless the declarant testified at the trial or the accused had had an earlier opportunity to cross-examine the declarant. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, at p. ___ [at p. 1374].) In this case, admission of the two boys' videotaped statements did not violate the confrontation clause under *Crawford* because Marquez did have an opportunity to confront the boys, who testified at trial and were available for cross-examination. Because admission of the statements in this case was constitutional, we necessarily also reject Marquez's contention that Evidence Code section 1360 is *facially* unconstitutional after *Crawford*.[1]

Marquez also argues in passing that admission of the videotaped statements under Evidence Code section 1360 violated his right to a fair trial and equal protection under the law. Because he fails to provide any substantial argument or citation to authority to support his contention, he has forfeited the contention on appeal. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1364, fn. 6.) We also note that the fairness-based arguments Marquez appears to make were rejected by this district in *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1325-1327, which rejected a due process challenge to section 1360.

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[1] Logically, a hearsay exception can never be considered facially unconstitutional under *Crawford*, even where the declarant does not testify, because a constitutional violation only occurs upon admission of testimonial hearsay of an unavailable declarant *without prior opportunity for cross-examination*. (*Crawford v. Washington, supra,* 541 U.S. at p. ___ [124 S.Ct. at pp. 1365-1366].) Where there has been such an opportunity for cross-examination, admission of testimonial hearsay is constitutional. (*Id.* at p. 1374; but see *People v. Pirwani* (2004) 119 Cal.App.4th 770, 786 [accepting Attorney General's concession that Evidence Code section 1380 is unconstitutional on its face].)

B. *The Videotaped Statements Were Properly Admitted Under Evidence Code Section 1360*

Marquez contends that admission of the videotaped statements was error because the trial court failed to hold a hearing as required by Evidence Code section 1360, subdivision (a)(2). (See *People v. Roberto V.*, *supra*, 93 Cal.App.4th at p. 1367.) That section includes as a requirement for admission that "[t]he court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (§ 1360, subd. (a)(2).) In this case, the prosecution moved on May 27, 2003, to admit the videotaped statements, and the trial court provided Marquez an opportunity to provide a written opposition if he so wished. The trial court indicated that it would then conduct a full hearing on the motion. On June 3, 2003, Marquez submitted the issue on the prosecution's written motion. The trial court granted the motion without a hearing, finding that the foundational requirements for admission under section 1360 had been met.

We conclude that Marquez waived any objection based on lack of a hearing on admissibility by submitting the issue on the prosecution's written motion. A judgment may not be set aside for the erroneous admission of evidence unless an objection or motion to strike was timely made and stated with specificity. (Evid. Code, § 353, subd. (a).) In this case, the trial court several times indicated its willingness to conduct a hearing. Marquez invited the trial court to forgo that hearing by submitting the issue on the prosecution's motion. Any error in making the section 1360 admissibility findings without a hearing has been waived.[2]

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[2] Although the court was not directly confronted with the objection at issue here, our result is consistent with that in *People v. Brodit, supra,* 61 Cal.App.4th 1312, which upheld the admission under Evidence Code section 1360 of various statements regarding which the trial court conducted no hearing. In that case, the trial court conducted a hearing regarding one statement, but regarding other statements made to other persons "[n]o further section 402 [admissibility] hearings were requested or held." (*Id.* at p. 1328.)

Marquez also contends that the videotaped statements lacked "sufficient indicia of reliability" to be admissible under Evidence Code section 1360. Marquez cites *People v. Kons* (2003) 108 Cal.App.4th 514 and *People v. Roberto V.*, *supra*, 93 Cal.App.4th 1350, for the proposition that we must independently review the trial court's finding of reliability. Those cases are inapposite; that standard of review applied only to the determination that hearsay is sufficiently trustworthy to survive a confrontation clause challenge under *Roberts*. (See *Kons*, at p. 524; *Roberto V.*, at p. 1374.) Here, we review for abuse of discretion the trial court's finding that the victims' statements were sufficiently reliable under section 1360. (*People v. Brodit*, *supra*, 61 Cal.App.4th at pp. 1329-1330.)

The trial court did not abuse its discretion in concluding the statements are reliable. Marquez argues that we should evaluate the statements based on standards developed in the child *sexual* abuse context, including "(1) spontaneity and consistent repetition of the statement(s); (2) the declarant's mental state; (3) the declarant's use of terminology unexpected of a child of similar age; and (4) the lack of a motive to fabricate." (*People v. Roberto V., supra,* 93 Cal.App.4th at p. 1374, citing *Idaho v. Wright* (1990) 497 U.S. 805, 821-822.) Although those factors may also bear some relevance in the physical abuse context, courts have "considerable leeway in their consideration of appropriate factors." (*Idaho*, at p. 822.) The "unifying principle" is "whether the child declarant was particularly likely to be telling the truth when the statement was made." (*Ibid*.)[3]

The trial court did not explain its reasoning at the time it found the statements admissible. But it did earlier state that "there are circumstances indicating or indicia of reliability based on [Mother's] reluctance to have the children testify or talk to the police

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[3] The Supreme Court in *Idaho v. Wright, supra,* 497 U.S. 805, described criteria relevant to the trustworthiness determination under the *Roberts* test. Although there may be differences between the Evidence Code section 1360 reliability determination and the *Roberts* trustworthiness determination, we believe the general propositions quoted above are applicable to both determinations.

and the children apparently talked to them against [Mother's] wishes. [And, based on that,] the statements were videotaped." We agree that those are adequate indicia of reliability to satisfy Evidence Code section 1360. That the boys spoke to the police contrary to Mother's wishes is a strong indicator of reliability. Absent other circumstances providing a motive to lie, it seems highly unlikely that the boys would have risked Mother's displeasure by lying to the police on such an important matter. Furthermore, that the statements were videotaped, while not in itself an indicator of reliability, did permit the jury to assess the boys' demeanor and make a more informed credibility determination. The trial court did not abuse its discretion in concluding that the videotaped statements were sufficiently reliable for admission under section 1360.

II. *The Trial Court Erred by Failing to Instruct With CALJIC No. 17.01*

In counts 6 through 11, Marquez was charged with six counts of infliction of corporal punishment or injury on a child (Pen. Code, § 273d). Counts 6, 7 and 8 alleged that, during the time period from March 15, 2002 through January 4, 2003, Marquez inflicted corporal injuries on his oldest son, Son-1, while counts 9, 10 and 11 charged Marquez with identical offenses during the same time frame against Son-2. Marquez contends the trial court prejudicially erred in failing to give, sua sponte, the instruction on unanimity, CALJIC No. 17.01,[4] regarding these six counts. We agree.

Criminal defendants have a constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321.) For a conviction to be valid, jurors must "unanimously agree defendant is criminally responsible for '*one discrete criminal event*.' " (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850,

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4 CALJIC No. 17.01 (July 2004 ed.) reads as follows: "The defendant is accused of having committed the crime of _____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he][she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or]

quoting *People v. Davis* (1992) 8 Cal.App.4th 28, 41.) To ensure that jurors do so, courts impose the "either/or" rule: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, if the evidence indicates jurors might disagree as to the particular act a defendant committed, and the prosecution makes no election, the trial court has a sua sponte duty to give CALJIC No. 17.01 or its equivalent. (See *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Russo*, at p. 1132.)

In this case, Marquez was charged with three counts with respect to each of his two older sons, but there was evidence of many more offenses; Son-1 testified that Marquez hit them on a weekly basis. The prosecutor did not formally elect among the various incidents[5] and the court did not give CALJIC No. 17.01 or its equivalent. During deliberations, the jury sent a note asking: "For identical counts 6, 7, 8 and 9, 10, 11, are we supposed to correlate 3 separate incidents, and if so, what are the 3 incidents. What is the difference between 6-11?" The trial court told the jury that it should determine which of the alleged violations occurred during the specified time period.

Respondent contends that other instructions provided to the jury adequately addressed the unanimity issue. The jury was instructed with CALJIC No. 17.02 that "[y]ou must decide each count . . . separately," and with CALJIC No. 17.50 that "[i]n

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[omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

5 The prosecutor did emphasize Marquez's spankings with a belt in closing argument. However, the jury was not instructed with CALJIC No. 4.72 or its equivalent regarding any election, which would have informed the jury of the prosecution's election and instructed the jury that it could only convict if it found that Marquez had committed the particular acts relied upon by the prosecution to prove its case. Neither did the prosecutor's argument directly inform the jurors of any election and of their duties flowing from such an election. (See *People v. Melhado*, *supra*, 60 Cal.App.4th at pp. 1534-1536.)

order to reach verdicts all twelve jurors must agree to the decision." These general instructions and the answer provided by the trial court to the jury's question during deliberations were not the equivalent of the unanimity instruction. In light of the jury's apparent confusion, we conclude there is a reasonable likelihood that the jury misconstrued the law. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Respondent contends this error was harmless for two reasons. First, respondent asserts that the jury's verdict was based upon Marquez's effective confession to two counts of misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)) for each son, because he testified that he spanked the boys with belts on two occasions. We disagree. "Section 273a holds every person to an objective standard of reasonableness regarding the causing of physical pain, mental suffering or injury to a child or the endangering of a child's person or health." (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1403.) The jury was instructed with CALJIC No. 4.80 that "It is lawful for a parent reasonably to discipline a child, and in doing so to administer reasonable punishment, including the infliction of reasonable corporal punishment." Here, Marquez testified that the spankings were for legitimate disciplinary purposes, that he explained the reasons for the spankings to the boys, that he did not hit them hard, and that the spankings did not leave any marks. Though this testimony admits the infliction of corporal punishment, it is not a confession of violating section 273a.

Next, respondent argues that the failure to give a unanimity instruction was at least harmless as to one count for each son, because the counts alleged a continuous course of conduct between March 15, 2002, and January 4, 2003. We disagree. It is well established that, although a single act of abuse is enough to sustain a conviction, a violation of Penal Code section 273a may also be established by a showing of " 'a continuous course of conduct of a series of acts over a period of time.' [Citation.]" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.) Such offenses are exempt from the unanimity instruction because "the multiple acts constitute a single criminal event. [Citation.]" (*Id.* at pp. 115-116.) The issue before the jury is " 'whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a

particular day.' [Citation.]" (*Id.* at p. 116.) As our Supreme Court has clarified, in deciding whether a unanimity instruction should have been given, we must determine whether conviction on a single count could have been based on two or more discrete criminal events or, alternatively, multiple acts formed the basis of a guilty verdict for one discrete criminal event. (*People v. Russo, supra,* 25 Cal.4th at pp. 1134-1135.)

In *Napoles,* the court relied on two factors to conclude that a course of conduct had been alleged and proved, eliminating the need for a unanimity instruction. First, the accusatory pleading alleged only one count of child abuse, occurring between specified dates. Second, the evidence in that case established a pattern of physical trauma inflicted upon the victim within a relatively short period of time. (*People v. Napoles, supra,* 104 Cal.App.4th at p. 116.) These same two factors require a different result here. The information alleged three separate counts of abuse of each child during the relevant time frame. Unlike the situation in *Napoles,* the jury here was not alerted, at the inception of the case, that the charge consisted of a continuous course of conduct to be proved by evidence of more than one individual act. (*Napoles*, at p. 116-117.) Instead, the case involved charges of three discrete acts of abuse against each child and evidence of many more incidents of abuse than those charged. Further, the evidence showed abusive acts occurring periodically over a nine- to ten-month period. Unlike *Napoles,* we believe that jury disagreement would have focused on whether one of several discrete crimes had occurred. The failure to give a unanimity instruction regarding these charges was not harmless. Accordingly, we reverse the convictions on counts 6, 7, 9 and 10.

III. *There Was Sufficient Evidence to Support the Verdict on Count 5*

Marquez contends that the evidence at trial was insufficient to support the conviction under count 5, for endangerment of his infant son, Son-3, the evening of January 5, 2003. We disagree.

"When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the verdict, drawing all inferences that reasonably support it, and determine whether it contains substantial evidence—that is, evidence which is reasonable, credible, and of solid

value—from which a trier of fact could rationally find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) Penal Code section 273a, subdivision (b) provides in pertinent part that "Any person who . . . having the care or custody of any child, . . . willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor." Actual injury is not an element of the crime. (*People v. Harris* (1966) 239 Cal.App.2d 393, 398.) Moreover, the situation creating a risk of harm need not involve actual physical contact between the defendant and child. (See, e.g., *Ibid*. [filthy living conditions]; *Little*, at pp. 771-772 [filthy living conditions and infant left unsecured on bed].)

Mother testified that on January 5, 2003, she attempted to retrieve Son-3 from Marquez and put the child to bed. Marquez then pushed her out the bedroom door. Marquez admitted that on that evening, he engaged in a pushing match with Mother. Mother was outside trying to push the door inwards, and Marquez was inside the bedroom trying to push the door closed. Marquez stated that the infant, Son-3, was on the floor behind him. If Marquez, who weighed about 250 pounds at the time, had lost his balance and fallen on the infant, he could have caused serious injury. Thus, Marquez's testimony alone provided substantial evidence from which a trier of fact could rationally find him guilty beyond a reasonable doubt of endangering Son-3.

IV. *Admission of Evidence of Domestic Violence in 1991 Was Not Unconstitutional*

Marquez contends that admission under Evidence Code section 1109 of Mother's testimony regarding Marquez's domestic violence in 1991 was unconstitutional because it created a risk that he was convicted on the basis of propensity evidence. This argument was rejected by the Fourth District in *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1029, which followed *People v. Falsetta* (1999) 21 Cal.4th 903. In *Falsetta*, the Supreme Court upheld admission of prior sexual offenses under section 1108 to show the defendant's propensity to commit the sexual offense at issue. Among other things, the court emphasized the relevancy of such propensity evidence and noted that a trial court's power to exclude unduly prejudicial evidence under section 352 is a "safeguard" that

preserves the constitutionality of section 1108. (*Falsetta*, pp. 915-917.) The *Hoover* court noted that prior acts of domestic violence are also particularly probative and that section 1109 also contains the section 352 safeguard. (*Hoover*, pp. 1027-1029.) Marquez provides no reason to deviate from these decisions, and we decline to do so.[6]

Marquez also contends that the trial court's jury instruction regarding the evidence of the 1991 domestic violence lowered the standard of proof at trial from beyond a reasonable doubt to preponderance of the evidence. The trial court instructed the jury under CALJIC No. 2.50.02 that it could consider prior acts of domestic violence as evidence of Marquez's disposition to commit another such offense. The instruction also cautioned, "[h]owever, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense in count 1. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime in count 1."

Marquez's contention is foreclosed by *People v. Reliford* (2003) 29 Cal.4th 1007 that upheld a similar instruction regarding the jury's use of propensity evidence admitted in sexual assault cases under Evidence Code section 1108. In *Reliford,* an instruction cautioned that prior act evidence is " 'not sufficient by itself to prove beyond a reasonable doubt that [defendant] committed the charged crime.' " (*Id.* at p. 1014.) With that cautionary language, reasonable jurors would understand that they could not convict based on the propensity evidence alone. (*Id.* at pp. 1014-1015) The instruction in this case contained such language, as well as the additional cautionary language that the prior act evidence is "simply one item" to consider in determining guilt beyond a reasonable doubt. (See *id.* at p. 1016 [approving this additional language in dicta].) There is no

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[6] Marquez makes no argument that evidence of the 1991 domestic violence should have been excluded under Evidence Code section 352.

reasonable likelihood that the jury understood the instruction as authorizing conviction on count 1 based on a lowered standard of proof. (*Id*. at p. 1016.)[7]

V. *The Sentence Imposed Is Not Unconstitutional Under Blakely*

The trial court imposed the upper term on count 2 based on the physical and emotional injury inflicted upon the victims, the repeated and ongoing nature of the abuse, the negative impact on the boys' development, and the fact that Marquez was on parole at the time of the offenses. The trial court also imposed a consecutive one-year sentence on count 1. Marquez contends that imposition of the upper term and imposition of the consecutive sentence violated his constitutional right to a jury trial under *Blakely v. Washington, supra,* ___ U.S. ___ [124 S.Ct. 2531]. We disagree.

In regard to the imposition of the upper term on count 2, we conclude that imposition of the upper term based on factors found by the trial court is consistent with *Blakely*.[8] Under the California sentencing scheme the lower, middle, and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, like Marquez, who is convicted of a violation of Penal Code section 273d, faces a maximum term of six years in prison that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington, supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 2537].) As *Blakely* explained, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that

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[7] Marquez's citation to the Ninth Circuit's decision in *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, is inapposite. The instruction at issue in that case lacked the cautionary language approved by the *Reliford* Court. (See *Gibson*, at pp. 817-819.)

[8] This was the conclusion our court reached in *People v. Picado* (rev. granted Jan. 19, 2005, S129826), and the matter has been deferred pending resolution of *People v. Black*

the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*.) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely*, at p. ___ [at p. 2540].) In this case, the six-year upper term was the maximum authorized sentence for violation of section 273d; the trial court's imposition of that maximum did not violate Marquez's right to jury trial.[9]

We also conclude that imposition of a consecutive term of punishment on count 1 was not unconstitutional. A trial court's imposition of consecutive sentences does not result in a usurpation of the jury's factfinding powers or the defendant's due process rights as long as each sentence imposed is within each offense's prescribed statutory maximum. Although our laws permit the trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard results in a lessening of the prescribed sentence—not an enhancement.[10]

(rev. granted July 28, 2004, S126182) and *People v. Towne* (rev. granted July 14, 2004, S125677).

9 Following oral argument in this matter, the United States Supreme Court decided *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738]. *Booker*, in our view, clarifies that *Blakely*'s Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott* (1994) 9 Cal.4th 331, 349-350.)

10 This was the reasoning of the Second District in *People v. Vaughn* (rev. granted Dec. 15, 2004, S129050).

DISPOSITION

The judgment is reversed as to counts 6, 7, 9 and 10, and affirmed in all other respects.

SIMONS, J.

We concur.

STEVENS, J.

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the upper term on count two was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado*, review granted January 19, 2005, S129826, and matter deferred pending resolution of *People v. Black*, review granted July 28, 2004, S126182, and *People v. Towne*, review granted July 14, 2004, S125677, California Rules of Court, rule 28.2(d)(2).

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id*. at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) Therefore, appellant was entitled to a jury determination of all aggravating facts that would permit the trial court to impose the six-year upper term on count two.

U.S. v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra,* at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California

court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.[1]

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Jones, P.J.

[1] Penal Code section 1170, subdivision (b) states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." (Italics added.)